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No. 03-1282

In the Supreme Court of the United States

HEALTHPLAN SERVICES, INC., ET AL.,

Petitioners,

v.

MARY B. GUNNELLS, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States (the Chamber) respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the petitioners. The petitioners have consented to the filing of the brief, and their written consent has been filed with the Clerk; the respondent, however, has refused to consent to the filing of the Chamber's brief.

The Chamber is the world's largest business federation representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

The rise of "issue classes" and the proper application of Federal Rule of Civil Procedure 23(c)(4)(A) is a matter of vital concern to the Chamber's members. An unduly expansive interpretation of Rule 23(c)(4)(A) permits the certification of classes that ought never to be certified. That, in turn, leads to unfairness and inefficiency, and it contributes to the phenomenon of "blackmail" litigation.

The decision below exemplifies this problem: Relying on Rule 23(c)(4)(A), the Fourth Circuit affirmed certification

of a single question: whether the petitioner in this case was a cause of a purported ERISA plan's failure. The answer to that question will not resolve a single class member's case. In so doing, the majority below rejected Judge Niemeyer's argument in dissent that as a matter of law individual issues cannot be severed for class certification *prior to* a predominance inquiry under Rule 23(b)(3).

If courts can certify "issue classes" without regard to whether common issues predominate in the case as a whole, businesses will be subjected to a substantial increase in class-action certifications, and their ability to defend themselves efficiently – or even effectively – will be compromised. Accordingly, the Chamber has a strong interest in encouraging this Court to review, and reverse, the decision below.

For the foregoing reasons, the motion of the Chamber of Commerce of the United States to file the accompanying brief as *amicus curiae* in support of Petitioners should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

A. This Case Implicates An Important, Recurring Question That Is The Subject Of A Persistent Division Of Authority 3

B. Rule 23(c)(4)(A) Does Not Permit Certification Of Issue Classes In Cases That Do Not Otherwise Meet Rule 23(b)'s Predominance Requirement 9

C. Expansive Issue Certification Contributes To The Problem Of "Blackmail" Litigation 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Amchem Products, Inc. v. *Windsor*,
521 U.S. 591 (1997) 9

Arch v. *Am. Tobacco Co.*,
175 F.R.D. 469 (E.D. Pa. 1997),
aff'd, 161 F.3d 127 (3d Cir. 1998) 2

Castano v. *Am. Tobacco Co.*,
84 F.3d 734 (5th Cir. 1996) 1, 4, 7, 8

Cohn v. *Massachusetts Mutual Life Ins. Co.*,
189 F.R.D. 209 (D. Conn. 1999) 2

Emig v. *Am. Tobacco Co.*,
184 F.R.D. 379 (D. Kan. 1998) 2

Gunnells v. *Healthplan Services, Inc.*,
348 F.3d 417 (4th Cir. 2004) 2

In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995) 11

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 1, 5, 11

In re Tetracycline Cases,
107 F.R.D. 719 (W.D. Mo. 1985) 2, 6, 8

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
259 F.3d 154 (3d Cir. 2001) 12

Parker v. Time Warner Entm't Co.,
331 F.3d 13 (2d Cir. 2003) 12

Rink v. *Cheminova, Inc.*,
203 F.R.D. 648 (M.D. Fla. 2001) 2

Robinson v. *Metro North Commuter R.R. Co.*,
267 F.3d 147 (2d Cir. 2001) 2, 7

TABLE OF AUTHORITIES

Page(s)

Simon v. *Philip Morris, Inc.*,
200 F.R.D. 21 (E.D.N.Y. 2001) 2

Valentino v. *Carter-Wallace, Inc.*,
97 F.3d 1227 (9th Cir. 1996).....2, 5, 7, 8

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TABLE OF AUTHORITIES

Page(s)

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Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249 3

Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003) 2, 3

Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986) 5

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Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157 (1998) 6

Patrick Woolley, Mass Tort Litigation and the Seventh Amendment Reexamination Clause, 83 IOWA L. REV. 499 (1998) 7

Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941 (1995) 11

Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action,* 14 REV. LITIG. 79 (1994) 6

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TABLE OF AUTHORITIES

Page(s)

Thomas Willging et al., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 184 (Federal Judicial Center 1996) 11

Miscellaneous

Fed. R. Civ. P. 23(f), 1998 Committee Note 11

H.R. Conf. Rep. No. 104-369 (1995) 12

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE[1]

The interest of the *amicus curiae* is described in the preceding motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The proper role of Federal Rule of Civil Procedure 23(c)(4)(A) is arguably the most significant and disputed question pertaining to class actions today. It has divided courts and scholars alike, and its resolution regularly determines whether huge lawsuits stand or fall. Now is the time for this Court to resolve this pressing issue, and this is the case by which to do so.

The question presented is unusually stark and clear: Does Rule 23(c)(4)(A) permit the certification of an "issue class" in a case that would not otherwise satisfy the predominance requirement of Rule 23(b)? Put another way, is Rule 23(c)(4)(A) a mere "housekeeping" provision, or is it an independent source of certification authority? The Fifth, and, at least implicitly, the Seventh Circuits have said that it is the former.[2] The Ninth and now the Fourth Circuits say it is the

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

[2] See *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 744-746 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

latter.[3] The Second Circuit has noted but not yet taken a side in the split.[4] The district courts are all over the map.[5] Academia is divided, as well.[6]

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[3] See *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *Gunnells* v. *Healthplan Services, Inc.*, 348 F.3d 417 (4th Cir. 2003).

[4] See *Robinson* v. *Metro-North Commuter R.R. Co.*, 267 F.3d 147, 167 n.12 (2d Cir. 2001).

[5] See, *e.g.*, *Rink* v. *Cheminova, Inc.*, 203 F.R.D. 648, 669-670 (M.D. Fla. 2001) (noting that (c)(4)(A) is "less than clear" and that "courts are not in agreement on the relationship between" subsections (b)(3) and (c)(4)(A)); *Cohn* v. *Massachusetts Mutual Life Ins. Co.*, 189 F.R.D. 209, 217-218 (D. Conn. 1999) (adopting *Castano's* view of (c)(4)(A)); *Arch* v. *Am. Tobacco Co.*, 175 F.R.D. 469, 496 (E.D. Pa. 1997) ("Plaintiffs cannot read the predominance requirement out of (b)(3) by using (c)(4) to sever issues until the common issues predominate over the individual issues."); *Simon* v. *Philip Morris, Inc.*, 200 F.R.D. 21, 28-31 (E.D.N.Y. 2001) (adopting *Valentino*'s approach); *Emig* v. *Am. Tobacco Co.*, 184 F.R.D. 379, 394-395 (D. Kan. 1998) (expressly embracing *Valentino*'s approach to (c)(4)(A) as authorizing "certification even if common issues do not predominate" but declining to certify on other grounds); *In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985) ("What defendants decry as a dilution of the predominance requirement, however, appears to this court to be precisely what Rule 23(c)(4)(A) allows in the interests of flexibility and economies of adjudication.").

[6] The two schools' analyses are perhaps best exemplified by a pair of recent law review articles. Compare Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 712 (2003) (arguing that "neither (c)(4)(A)'s text, its structural placement, nor its rulemaking history provide support for an adventurous interpretation of the provision," and concluding that the Rule "simply cannot authorize an issue class action end-run around the predominance requirement for class actions that otherwise would fail to satisfy that requirement") with Jon Romberg, *Half a Loaf Is*

The Chamber believes that only the limited, "housekeeping" interpretation can be squared with the text, structure, and history of Rule 23(c)(4)(A). Expansive, freestanding issue certification under the Rule, on the other hand, constitutes an improper end-run around Rule 23's vital predominance requirement – a requirement that serves as the main guarantor of efficiency and fairness in the class-action context. This protection is particularly important, given the increase in class-action litigation over the last decade. Either way, however, the question is of the utmost importance and persistence, making guidance from this Court not only appropriate, but essential.

ARGUMENT

A. This Case Implicates An Important, Recurring Question That Is The Subject Of A Persistent Division Of Authority.

Writing prior to the Fourth Circuit's decision in this case, a perceptive commentator noted that "there exists today a still quiet but increasingly pronounced split of authority as to the meaning of Rule 23(c)(4)(A). Such disuniformity and uncertainty should be cause for concern at the very least and, at worst, might well result in great mischief." Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003) (hereafter, "Hines").

Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A), 2002 UTAH L. REV. 249, 263, 281 (arguing that issue certification "can fundamentally revamp the nature of class actions," and criticizing courts for "fail[ing] to grasp" the full meaning of (c)(4)(A), which allows resolution of common issues while permitting complicated individual issues to be "severed away cleanly and painlessly").

The split is now deeper, and is no longer "quiet," given the sharp exchange between Judge Niemeyer and the majority in this case (and the 7-5 division in the en-banc-rehearing vote below). The prospect of "great mischief", moreover, is exemplified not only by the result in this case, but by numerous others as well.

Rule 23(c)(4)(A) states, "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues . . . and the provisions of this rule shall then be construed and applied accordingly."

The Rule "fails to specify under which circumstances it might be 'appropriate' to invoke (c)(4)(A), leaving courts and commentators to continue to debate that very topic thirty-some years after its enactment." Hines at 717. The most significant aspect of this debate concerns whether the provision permits certification of classes when, for the case as a whole, the "predominance" requirement of Rule 23(b)(3) is not satisfied. A number of courts and academics have said that it does not. In *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), for example, the Fifth Circuit struck down the certification of an expansive issue class action. Rejecting the district court's issue-by-issue predominance analysis, the court held that severing common from individual issues via (c)(4)(A) "does not save the class action." The court explained that:

> A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial. Reading rule 23(c)(4) as allowing a court to sever issues until the re-

> maining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

84 F.3d at 745 n.21 (citations omitted).[7]

On the other side of the fence are the courts and academics that advocate an expansive role for Rule 23(c)(4)(A). In *Valentino* v. *Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996), for example, the Ninth Circuit held that "[e]ven if the common questions do not predominate over the individual questions," a district court is authorized "to isolate the common issues under Rule 23(c)(4)(A) and proceed with

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[7] See also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (issuing writ of mandamus decertifying a 23(c)(4)(A) "issue" class, noting that the district judge's "experiment with an innovative procedure for streamlining the adjudication of this 'mass tort,' * * * so far exceeds the permissible bounds of discretion in the management of federal litigation as to compel us to intervene and order decertification"); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 955 (1998) (noting that the predominance requirement "has generally been understood (and I think correctly) to override the possibility of certification of a class on particular issues under Rule 23(c)(4) unless those issues are found to 'predominate' over the individual issues in the case"); Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1059 (1986) ("before a 'limited issue class' can be certified pursuant to subdivision (c)(4)(A), the lawsuit must be certified under a Rule 23(b) category. Thus, the mass-tort litigant cannot utilize Rule 23(c)(4)(A) to maintain a class action in circumstances that would otherwise not support certification of a class").

class treatment of these particular issues."[8] Similarly, the Wright & Miller treatise instructs that when a class action fails the b(3) predominance test, a court should still "consider the possibility of determining particular issues on a representative basis as permitted by Rule 23(c)(4)(A)." 7A Charles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1778 (2d ed. 1986). In that fashion, the Rule's use can "recast a non-predominating class action into one that may predominate for purposes of Rule 23(b)(3)." *Ibid.* (Internal quotation marks omitted.)[9] This approach relies on a strained

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[8] See also, *e.g.*, *In re Tetracycline Cases*, 107 F.R.D. 719, 727 (W.D. Mo. 1985), in which the court approved the broad reading of (c)(4)(A) and held that the effect of the provision "is to lessen * * * the importance of the predominance requirement."

[9] See also Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 230 (1998) (commending the use of issue class actions in mass tort cases); Elizabeth J. Cabraser, et al. New Issues and Key Rulings in the Certification, Trial, Settlement, and Appeal of Class Actions 16 (ABA CCLE Nat'l Inst. Oct. 19, 2001) (arguing that Rule 23(c)(4)(A) "seems poised for a renaissance"); Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 326 (1983) (Rule 23(c)(4)(A) has been "underutilized and overlooked."); Susan E. Abitanta, *Comment, Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution*, 36 SW. L.J. 743, 752 (1982) (while Rule 23(c)(4)(A) originated as a "tool of economy [it] now serves as a means to establish predominance"); MANUAL FOR COMPLEX LITIGATION § 30.17 (3d ed. 1995) (embracing expansive reading of 23(c)(4)(A)); Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS §§ 4.23, 4.25 (3d ed. 1992) (same); Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action,* 14 REV. LITIG. 79, 83, 95-96 (1994) (same); Elizabeth J. Cabraser, Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication, 36 WAKE FOREST L. REV. 979 (2001) (same); Patrick Woolley, Mass Tort Litigation

reading of the text and history of Rule 23. It allows district courts to sidestep the procedural safeguards carefully built into Rule 23(b), cobbling together a "class" of plaintiffs with disparate interests, who cannot reliably be ensured of adequate representation at the class level.

With its holding that the predominance requirement need not be satisfied at the threshold, the Fourth Circuit has now stepped foursquare into the conflict. The panel majority held that "when appropriate a class action may be maintained as to particular issues and, *after* that is done, the provisions of [Rule 23], such as the predominance requirement of (b)(3) shall *then* * * * be construed and applied." *Gunnells*, 348 F.3d at 439 (emphasis in original; internal quotation marks omitted). That holding conflicts with the decision of the Fifth Circuit in *Castano* and aligns the Fourth Circuit with the Ninth Circuit in *Valentino.* The conflict – acknowledged by the Second Circuit in 2001 (see *Robinson* v. *Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001)) – is now a significant one, and the Fourth Circuit's narrow rejection of rehearing en banc means that it cannot be expected to resolve itself.

The facts of this case vividly demonstrate why 23(c)(4)(A) "issue classes" are so problematic. The "issue" as to which the class was certified – whether the defendant's actions were a proximate cause of the plaintiffs' losses – is not dispositive of the majority of other issues necessary to resolve any individual plaintiff's claim. The Byzantine structure of this action only highlights the point: The court stripped away individualized questions of liability by certifying 24 subclasses in the first phase of the trial. A separate damages phase will occur later. It was only after removing

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and the Seventh Amendment Reexamination Clause, 83 IOWA L. REV. 499, 500, 501, 525, 536 (1998) (same).

individualized questions of *both* liability *and* damages that the court was finally able to identify a common issue. Class certification in this case – even when limited to one common issue – will not therefore make the ultimate adjudication any more efficient; it will simply place pressure on the defendant to settle the case before trial.

Responding to Judge Niemeyer's dissent, the majority below sought to argue that it was simply applying the predominance test at the "cause of action" level. See, e.g., *Gunnells* 348 F.3d at 441. That is a non sequitur. Even if Rule 23 permitted slicing-and-dicing among causes of action and it is not at all clear that it does there ***is*** no "cause of action" in this case that encompasses the issue certified, and the majority did not even try to identify one.

The conflict at issue is of great consequence.

> "District courts already have struggled to make sense of the split in authority on the viability of an issue class action 'alternative.' A number of courts have followed the narrow view of (c)(4)(A) asserted in *Castano*, rejecting plaintiff proposals to certify expansive issue class actions without regard to predominance of the whole case. But an equal number of district courts follow the more expansive approach to (c)(4)(A) offered in *Tetracycline* and *Valentino*, even while some have concluded (as did the court in *Tetracycline*), that the proposed class could not be certified even under a less demanding standard."

Hines at 746-747. The important, recurring question presented by the petition is the subject of a persistent split of authority that calls out for resolution by this Court.[10]

B. Rule 23(c)(4)(A) Does Not Permit Certification Of Issue Classes In Cases That Do Not Otherwise Meet Rule 23(b)'s Predominance Requirement

The circuits, including the Fourth Circuit, that have eschewed a threshold predominance requirement are wrong. Their analysis cannot be squared with the text, structure, and history of the class-action rules. Moreover, their expansive approach to issue certification is inconsistent with this Court's decision in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997).

Under the expansive interpretation of Rule 23(c)(4)(A), issue class actions will satisfy the (b)(3) predominance requirement simply by definition, because non-predominating questions will have been sliced away. But there is no indication that the framers of the Rules intended so sweeping a role for the provision. Quite the contrary: The 1966 Advisory Committee Note to Rule 23 devotes just two sentences to Rule 23(c)(4)(A). The example given a fraud case in which liability is determined in a class action but damages are individually adjudicated indicates a far narrower anticipated use of the provision.

The placement of the provision is significant, as well. Subdivision (c) of Rule 23 includes a variety of class action

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[10] The consequences of the split are wide-ranging, even outside the federal system: Rule 23 is "the most prevalent model for state [class action] rules," and many states look to federal-court interpretations of Rule 23 to guide their own practice. See Herbert B. Newberg & Alba Conte, Newberg on Class Actions 13:1 (4th ed. 2002).

management provisions, addressing the timing of a class action order,[11] the need to provide notice to members of a (b)(3) class action and the content of such notice,[12] the binding effect of any judgment that might result from the certified class action,[13] and the procedure by which a court may divide a certified class action into subclasses.[14] It also includes Rule 23(c)(4)(A).

> "[S]ome conclusions may be drawn from (c)(4)(A)'s position within the structure of Rule 23 as a whole. Its placement in subdivision (c), for example, reflects a managerial rather than a primary role for (c)(4)(A). * * * None of the other subdivision (c) provisions alter the terms under which a (b) class action may be certified, or provide independent authority to certify another type of class action."

Hines at 718-719. Finally, as Judge Niemeyer concisely explained, "[i]n failing to examine the various other issues presented in the entire action to determine whether the required 'cohesiveness' is present to 'legitimize[] representative action in the first place' – as mandated by 23(b)(3), *see Amchem*, 521 U.S. at 623 – and by jumping to 23(c)(4), the majority * * * bypasses one of the most essential and most important checks imposed by Rule 23 on certifying Rule 23(b)(3) classes." *Gunnells*, 348 F.3d at 452 (Niemeyer, J., concurring in part and dissenting in part).

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[11] Fed. R. Civ. P. 23(c)(1).

[12] Fed. R. Civ. P. 23(c)(2).

[13] Fed. R. Civ. P. 23(c)(3).

[14] Fed. R. Civ. P. 23(c)(4)(B).

Because the expansive interpretation of Rule 23(c)(4)(A) cannot be reconciled with the Rule itself and the decisions of this Court, the petition should be granted.

C. Expansive Issue Certification Contributes To The Problem Of "Blackmail" Litigation.

The Fourth and Ninth Circuits' approach to Rule 23(c)(4) represents a significant liberalization of the requirements for class certification. Its inevitably increases defendants' exposure to the uncertainties and high stakes that accompany class certification.

That is extremely problematic, because class actions seeking massive damages are often trial-proof. If they survive dismissal, the bet-the-company risks to a defendant of a jury trial in large class actions are so enormous that even weak cases are usually settled. See Thomas Willging et al., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 184 table 40 (Federal Judicial Center 1996); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 958 (1995) (noting that the costs and risks of trial induce settlement of more than 95% of all civil claims). However meritless a company may judge the claim, defendants typically cannot "stake their companies on the outcome of a single jury trial." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995); see also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995). This phenomenon of "blackmail settlements" "induced by a small probability of an immense judgment" is universally acknowledged to occur and to be a serious problem with the class action device. Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973); *Rhone-Poulenc*, 51 F.3d at 1298; see, *e.g.*, Fed. R. Civ. P. 23(f), 1998 Committee Note ("An order granting certification * * * may force a de-

fendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001). Even obviously frivolous filings are often settled, simply because they are "as costly to litigate as legitimate claims." *Developments in the Law – The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 HARV. L. REV. 1806, 1812 (2000). See also H.R. CONF. REP. No. 104-369, at 32 (1995) (explicitly noting the high incidence of frivolous securities filings as a justification for the passage of the Private Securities Litigation Reform Act ["PSLRA"]).

As numerous courts and commentators have pointed out, the prevalence of "blackmail settlements" has tainted the reputation of large class action lawsuits, which are viewed with a jaundiced eye by the public and the business community. See, *e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371-372 (2000) ("Correspondingly, where the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest."); Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1775 (1997) ("More practically, from the defendants' perspective, class actions are the ultimate weapon of legal terrorism, launched by litigation-mad, bottom-feeding, money-hungry, professional plaintiffs' lawyers."); James A. Henderson, Jr., *Comment: Settlement Class Actions and the Limits of Adjudication*, 80 CORNELL L. REV. 1014, 1021

(1995) ("Rather than creating the appearance of a public confession of guilt, which might deliver a lesson in morality, settlement class action agreements more closely resemble the payment of blackmail by a corporation whose very survival is threatened by what might well, if taken to trial, prove to be groundless claims.").

Liberalization of the requirements for class certification would have distinctly negative consequences not only for defendants, but for the integrity of our judicial system as a whole. For that reason, certiorari should be granted, and the expansive approach to issue certification endorsed by the Fourth and Ninth Circuits should be rejected by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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